is of course problematical. It is submitted that at least in those sections of the country where the supply of water in streams is abundant the doctrine of the Massachusetts court as expressed in the *Stratton* case is preferable to the strict rule of the English courts.

In streams nature has provided tremendous possibilities for public good, and it would seem a clear dictate of common sense and a wise public policy that all possible avail should be made thereof. The common law has declared that riparian owners, in respect of their riparian lands, shall have the primary and perhaps the sole right of use of the waters. For the present purpose it may be conceded that it is wise that such persons in respect of such lands should have the primary right, but it is believed that it is not wise to give them the *exclusive* right when thereby a portion of nature's gift is squandered. If the riparian proprietor is assured his primary right of use, he is amply protected therein by his right of action against any one above, whether riparian owners in the strict sense or not, who makes such a use of the stream as to result in actual or potential injury. It may well be that proof merely of such potential injury should not be sufficient basis for a cause of action. the reason for allowing the action when there is a showing only of possible future injury is of course to prevent the acquisition of a prescriptive right. To deny to some member of the public a use of a stream, perhaps to him very beneficial, merely on the ground that some riparian proprietor lower down would be injured thereby if he were to make a use of the stream which he would be entitled to make but which as a matter of fact he is not making, thus losing to all this gift of nature, may well be said by anyone but the precedent-worshipper to be absurd. If some theory is required to prevent such use ripening into a prescriptive right, why not imply a license on the lower owner's part, so long as his rights are not actually injured, thus meeting any claim of adverse user by the upper owner? In cases such as the principal case it might be well to consider a diversion of water to non-riparian land as presumptively injurious to the lower owner, thus casting upon the abstractor the burden of proving that his diversion was, under the circumstances, lawful. R. W. A.

THE AUTHENTICATION OF REAL EVIDENCE.—To what extent the various objects constantly proffered to the courts as real evidence must be authenticated before admission and how far proponent may rely on judicial notice to supply defects in authentication, is involved in the case of *State* v. *Pierce*, 88 Atl. 740, recently decided in the Supreme Court of Vermont.

Respondent, a physician, was on trial for failure to report a case of diphtheria to the proper authorities as required by a Vermont statute. Proof that respondent knew the nature of the ailment was necessarily circumstantial, one evidentiary fact being his knowledge that X, another member of the same family; had died of the same disease about two months before. Some ten days after the death of X, her body had been exhumed and the larynx removed in the presence of the respondent. On the trial the removed organ was shown to an expert witness who was allowed to testify, over respondent's

objection, that its condition was so plainly diphtheritic as to be apparent to the ordinary medical practitioner. No evidence had been given tending to show that the condition of the larynx at the trial was the same as when it was removed from the body. Though the specific ground of objection was not indicated, the Supreme Court treated the objection on appeal as if it had been well raised, and passed on the question of authentication of the organ. It was held that the admission of expert testimony based on the present condition of the larynx was without error although there had been no proof that its condition was the same as when it was removed from the body. Said the court, "We must assume that the organ had been in a preservative liquid since, for it is common knowledge, of which we may take judicial notice, that such is the means employed by the medical profession."

In general, before material objects of any kind are admissible as demonstrative evidence, the court must first be satisfied of the identity of the object and that it is in substantially the same condition as at the time in issue. This applies both to articles such as the clothing of a deceased person, weapons, mechanical devices, animals, or parts of an exhumed body presented for the inspection of the jury, and to photographs, maps and diagrams which are used by the witness as a part of, or as a graphic illustration of, his testimony.

It is settled law in regard to the use of photographs as evidence that they must first be identified as fair representations of the locus or thing in question, and proof given that they portray it in substantially the same condition that existed when the act complained of occurred: *Leidlein* v. *Meyer,* 95 Mich. 586; *Verrain* v. *Baird,* 150 Mass. 142; *Kas. City Ry.* v. *Smith,* 90 Ala. 25; *Cooper* v. *St. Paul Ry.,* 54 Minn. 379; *State* v. *O'Reilly,* 126 Mo. 597; *Locke* v. *Sioux City Ry.,* 46 Ia. 109; *Howard* v. *Russell,* 75 Tex. 176; *Cleveland Ry.* v. *Monaghan,* 140 Ill. 483.

The same principle applies to the authentication of other objects introduced for inspection by the jury. It is necessary that the object offered in evidence be identified, and proof should be given that it has not been tampered with nor its condition changed since the time in issue: *People* v. *Gonzales,* 35 N. Y. 49; *State* v. *Cadotte,* 17 Mont. 315; *Com.* v. *Bentley,* 97 Mass. 551; *State* v. *Hossack,* 116 Ia. 194. Thus in *Self* v. *State,* 90 Miss. 58, which was a prosecution for murder, the skull of the exhumed body was offered in evidence and excluded on the express ground that its condition had altered since the time of the homicide. The court says, "It ought to have been shown that the skull, granting it to be the skull of the deceased, was in the same condition at the time of its exhibition to the jury that it was at the time of burial. * * * All the proper preliminary evidence should be clear and satisfactory." The court also cites WIGMORE, § 1154 (6), with approval: "The present condition of an object may not be the same as at the time in issue nor so nearly the same as to be proper evidence of its former condition; accordingly autopic proference is allowable only on the assumption that the condition is the same or sufficiently similar." The case of *State* v. *Novak,* 109 Ia. 717, presented a similar question. Here the skull of the murdered man was admitted in evidence, the court passing on the question of authenti-

cation. The necessity for proof that the condition of the object was the same at the time of the trial as at the commission of the crime was recognized in the following language: "The record is such a disclosure as to put the matter beyond a doubt that the skull when in evidence was in the same condition in which it was found after the fire, in every essential particular."

In *State* v. *Goddard,* 146 Mo. 177, the door of a room in which a homicide had been committed was introduced for the inspection of the jury to show the location of pistol balls, no proof being given that its condition had remained unchanged. On appeal this was held error, the supreme court ruling that it should first have been shown that the door had remained in the same condition since the homicide.

In *French* v. *Wilkinson,* 93 Mich. 322, exhibition of an injured limb to the jury was held error, in the absence of proof that its then condition was the same as after the accident. This rule is also approved by WHARTON, in his work on CRIMINAL EVIDENCE. In speaking of the use of these species of evidence, he says, "If practicable they should be secured and brought into court, though before admitting them there should be evidence that they have not been tampered with since the commission of the crime."

In the principal case there was no evidence to show that the larynx was in the same condition at the time of the trial as it was when removed from the body. The question, then, comes to this: Can the court supply the omission of this preliminary evidence by judicially noticing the usual methods of preserving such organs? This question the court answered in the affirmative. It may be granted in passing that the use of such methods is a fact appropriate for judicial cognizance. Courts judicially notice the general course of business in the varied commercial and professional occupations, and such facts as form a part of the general knowledge of intelligent men: *La Rose* v. *Logansport Nat. Bank,* 102 Ind. 332; *Stephenson* v. *Allison,* 123 Ala. 439; *L. S. & M. S. Ry. Co.* v. *Miller,* 25 Mich. 274; *Moreno* v. *State,* 64 Tex. Cr. App. 660. But even so, the reasoning of the Vermont court is inconclusive. It involves not merely judicial notice of the methods of preserving such organs, but also an assumption that such methods were employed here, and that the condition of the larynx had remained unchanged. Testimony indicating that the usual method had been adopted or that the organ had been kept in some preservative, would have justified the court in judicially noticing the existence and efficacy of the method, but no testimony to this effect had been given. The case is analogous to that of photographs. Courts constantly take judicial notice of the accuracy of photographic reproductions; *Cowley* v. *People,* 83 N. Y. 464; *Luke* v. *Calhoun County,* 52 Ala. 115; *Udderzook* v. *Com.,* 76 Pa. St. 340; *Huston & T. C. Ry.* v. *Shapard,* 54 Tex. Civ. App. 596; yet this has never been held to dispense with the necessity for verification either as to their identity and fairness or as to change in the object in question. So in the principal case it is difficult to see how judicial cognizance of the medical practice could dispense with the necessity of proof that such method had in fact been employed, and that the condition of the larynx had not been either carelessly or designedly altered.

Although there is no difference in the admissibility of evidence in civil

and criminal actions, it is nevertheless noteworthy that the principal case is a criminal prosecution, and that the court supplied a serious omission of evidence not merely by judicially noticing the possibility of preserving the organ but also by assuming that it had in fact been so preserved. It is generally true that courts require much clearer proof in criminal than in civil actions, and it would seem therefore that the court here was influenced somewhat by the exigencies of the particular case and a desire to save it from reversal.

S. S. W.

THE USE OF INJUNCTION TO PREVENT A MULTIPLICITY OF SUITS AT LAW.—In the case of *Newell et al.* v. *Illinois Central R. Co.*, 63 So. 351, the Mississippi Supreme Court dealt with the right of a court of equity to enjoin the plaintiffs in a number of suits at law against the same defendant from further prosecuting them at law and to compel the merging of them into an equitable suit. In this case, a number of persons who had been injured in the wreck of an excursion train on the railroad of the defendant, had filed separate suits against the defendant to recover for injuries alleged to have been sustained. The railroad company sought an injunction against the further prosecution of the suits at law, asking the court of chancery to take jurisdiction of all the issues involved in the various suits. It was held that such an injunction would not be granted. The law in this country has been in an unsettled state, as regards this question, and the decision in the principal case shows the trend of modern authority.

Equity has jurisdiction, in certain cases, to restrain the bringing of a number of suits at law against the same defendant, and justifies the assumption of such jurisdiction on the ground that the law courts are inadequate to combine and adjust manifold and adverse claims and interests. By assuming jurisdiction, equity settles and disposes of the whole controversy in a single proceeding, and thus prevents a multiplicity of suits. Where a number of plaintiffs are suing a single defendant in several suits at law, the authorities agree that equity will decide the controversy in one suit in chancery, provided there is a community of interest between the plaintiffs. The question over which the authorities have differed is, what constitutes such a community of interest.

The view advanced by Mr. POMEROY and the courts which follow him is that in such cases, mere community of interest in the questions of law and fact involved in the general controversy is sufficient to justify equity jurisdiction. This proposition will be found in § 269 of Professor POMEROY'S work on EQUITY JURISPRUDENCE. One of the strongest cases in support of this view is the case of *Southern Steel Co.* v. *Hopkins*, 157 Ala. 175, 47 So. 274, 20 L. R. A. N. S. 484, 131 Am. St. Rep. 20, which overruled *Turner* v. *Mobile*, 135 Ala. 73, 33 So. 132. Another case holding this view is the case of *Whitlock* v. *Yazoo*, 91 Miss. 779, 45 So. 861.

The other view on the question is that community of interest in the questions of law and fact alone, will not justify equity jurisdiction. The case of *Tribbette* v. *Illinois Central R. R.*, 70 Miss. 182, 12 So. 32, 19 L. R. A.